U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 November 2004

CASE NO.: 2003-BLA-6045

In the Matter of

FRANKLIN DELANO WATKINS,
Claimant

v.

DEHUE COAL COMPANY,
Employer

and

A.T. MASSEY,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Franklin Delano Watkins, *Pro se*

Mary Rich Maloy, Esq.,
For the Employer

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a miner's duplicate claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*., as amended ("Act"), filed on August 13, 2001, respectively. The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;
2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,
3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal worker's pneumoconiosis" ("CWP")) as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The claimant filed his first prior claim for benefits on April 1, 1991. (Director's Exhibit ("DX") 1). On July 30, 1992, Administrative Law Judge Holmes issued a Decision and Order denying benefits.

The claimant filed his current claim for benefits on August 13, 2001. (DX 3). On March 20, 2003, the claim was denied by the district director because the evidence failed to establish the element of entitlement that Mr. Watkins was totally disabled due to pneumoconiosis. The District Director found the Claimant has pneumoconiosis caused by coal mine employment. (DX 22). On March 26, 2003, the claimant requested a hearing before an administrative law judge. (DX 23). On March 31, 2003, the case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Program (OWCP) for a formal hearing. (DX 24). A January 7, 2004 hearing was continued by Administrative Law Judge Purcell for the Claimant to seek an attorney to represent him in his federal black lung claim. I was assigned the case on February 3, 2004.

On July 1, 2004, I held a hearing in Charleston, West Virginia, at which the employer was represented by counsel.[1] Claimant's daughter, Lucy Kara Shamblin, represented Mr. Watkins at the hearing as a lay representative. No appearance was entered for the Director, Office of Workman Compensation Programs (OWCP). The parties were afforded the full opportunity to present evidence and argument. Director's exhibits ("DX") 1-29, and Employer's exhibits ("EX") 1, 2, 4, 5, 6, 7, 9, 10, 13 and 14[2] were admitted into the record.

On August 23, 2004, Employer's counsel submitted a closing brief.

ISSUES

I. Whether the miner has pneumoconiosis as defined by the act and the Regulations?

[1] Under *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1998)(en banc), the location of a miner's last coal mine employment, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction. Under *Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989), the area the miner was exposed to coal dust, i.e., here the state in which the hearing was held, is determinative of the circuit court's jurisdiction.

[2] Employer's exhibits 3, 8, 10a, 11, 12 and 15 were not admitted due to exceeding the evidentiary limitations of 20 C.F.R. § 725.414.

II. Whether the miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner is totally disabled?

IV. Whether the miner's disability is due to pneumoconiosis?

V. Whether there has been a change in an applicable element of entitlement upon which the order denying the prior claim became final?

FINDINGS OF FACT

I. Background

A. Coal Miner

The claimant was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for at least 13 years. Employer conceded to 13 years of coal mine employment. Claimant testified that he worked in the coal mines on and off from 1960 through 1984. Claimant testified that he quit working in 1984 because the mine shut down. He stated that he worked between five to seven days a week for at least eight hours a day. Claimant began working for Southern Public Service Company laying gas lines in 1986. In Claimant's first claim, Administrative Law Judge Holmes determined the Claimant had around 20 years of coal mine employment. I find the Claimant worked in the coal mines at least 13 years. Any discrepancy in the exact number of years of coal mine employment is inconsequential for the purpose of rendering this decision. (Hearing Transcript (TR) 9, 14, 26, 27).

B. Date of Filing

The claimant filed his claim for benefits, under the Act, on August 13, 2001. (DX 3). None of the Act's filing time limitations are applicable; thus, the claim was timely filed.

C. Responsible Operator[3]

Dehue Coal Company is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart F (Subpart G for claims filed on or after Jan. 19, 2001), Part 725 of the Regulations.

D. Dependents

The claimant has no dependents for purposes of augmentation of benefits under the Act. (TR 22).

[3] Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator. 20 C.F.R. § 725.493(a)(1) defines responsible operator as the claimant's last coal mine employer with whom he had the most recent cumulative employment of not less than one year.

E. Personal, Employment and Smoking History[4]

The claimant was born on March 14, 1935. (DX 3). He married Rosemary Adams on December 14, 1957. The couple divorced in 1984. Mr. Watkins provides no support to his ex-wife. (DX 3; TR 22). The Claimant's last position in the coal mines was that of a continuous mine operator. Claimant stated that all of his coal mine work was underground. Claimant testified that his job required him to drag heavy cables. He stated that a whole cable would "weigh about a ton." On the Department of Labor Description of Coal Mine Work and Other Employment form (Form CM-913), Claimant answered that he lifted over 100 pounds ten times a day. He also stated that he had to carry 50 to 100 pounds an average of 150 feet twice a day. (DX 5; TR 14-15).

There is evidence of record that the claimant's respiratory disability is due, in part, to his history of cigarette smoking. The evidence is conflicting concerning the miner's smoking history. At the July 1, 2004 hearing, Claimant testified that he is not currently a cigarette smoker. In his 1992 decision, Administrative Law Judge Holmes stated that the Claimant began smoking in 1986 and was still smoking at the time of the hearing. Dr. Zaldivar noted a 6 year smoking history. In contrast, Dr. Ranavaya noted 40 years of smoking at one pack per week. Claimant testified that he smoked intermittently from 1951 through 1990. However, I find he smoked at least 10 years, quitting in the early 1990's.

II. Medical Evidence[5]

The following is a summary of the evidence submitted since the final denial of the prior claim.

A. Chest X-rays[6]

There were six readings of three X-rays, taken on October 31, 1988, October 23, 2001 and October 27, 2003. (EX 1, 6, 7, 10; DX 16 and 17).[7] One is positive, by Dr. Ranavaya, a B-reader.[8] Four are negative, by three physicians, Drs. Scott, Wheeler and Zaldivar, all of whom

[4] "The BLBA, judicial precedent, and the program regulations do not permit an award based solely upon smoking-induced disability." 65 Fed. Reg. 79948, No. 245 (Dec. 20, 2000).

[5] *Dempsey v. Sewell Coal Co. & Director, OWCP*, ___ B.L.R. ___, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004). BRB upheld regulatory limitations on the admissibility of medical evidence, under the new 2001 regulations, i.e., 20 C.F.R. Sections 725.414 and 725.456(b)(1).

[6] In the absence of evidence to the contrary, compliance with the requirements of Appendix A shall be presumed. 20 C.F.R. § 718.102(e)(effective Jan. 19, 2001).

[7] ILO-UICC/Cincinnati classification of Pneumoconiosis – The most widely used system for the classification and interpretation of X-rays for the disease pneumoconiosis. This classification scheme was originally devised by the International Labor Organization (ILO) in 1958 and refined by the International Union Against Cancer (UICQ) in 1964. The scheme identifies six categories of pneumoconiosis based on type, profusion, and extent of opacities in the lungs.

[8] *LaBelle Processing Co. v. Swarrow,* 72 F.3d 308 (3rd Cir. 1995) at 310, n. 3. "A "B-reader" is a physician, often a radiologist, who has demonstrated proficiency in reading X-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51. Courts generally give greater weight to X-ray readings performed by "B-readers." *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n.

are either B-readers, Board-certified in radiology, or both.[9] Dr. Binns provided a quality-only reading of the October 23, 2001 X-ray.

Exh. #	Dates: 1. X-ray 2. read	Reading Physician	Qualifications	Film Quality	ILO Classification	Interpretation Or Impression
EX 10	10/27/2003 12/8/2003	Dr. Wheeler	B, BCR	2		No parenchymal abnormalities consistent with pneumoconiosis.
EX 6	10/27/2003 10/27/2003	Dr. Zaldivar	B, BCI/P	1		No abnormalities consistent with CWP. Bilateral pleural lateral and apical thickening.
EX 1	10/23/2001 6/25/2003	Dr. Scott	B, BCR	1		Bilateral peripheral infiltrates and/or fibrosis, probably TB, unknown activity. Some associated pleural thickening on left side.
DX 16	10/23/2001 1/21/2002	Dr. Binns	B, BCR	1		Quality reading
DX 15	10/23/2001 10/23/2001	Dr. Ranavaya	B	1	1/2	
EX 7	10/31/1988 11/15/2003	Dr. Zaldivar	B, BCI/P	1		

* A-A-reader; B-B-Reader; BCR – Board Certified Radiologist; BCP – Board-certified pulmonologist; BCI – Board-certified internal medicine; BCI(P) – Board-certified internal medicine with pulmonary medicine sub-specialty. Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987) and, *Old Ben Coal Co. v. Battram,* 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993). B-readers need not be radiologists.

**The existence of pneumoconiosis may be established by chest X-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest X-ray classified as category "0," including subcategories "0/-, 0/0, 0/1," does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp*., 6 B.L.R. 1-307 (1983) (Under Part 727 of the Regulations) and *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 (June 19, 1997)(*en banc)(Unpublished)*. If no

16, 108 S.Ct. 427, 433 n. 16, 98 L.Ed. 2d 450 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n. 2 (7th Cir. 1993)."

[9] *Cranor v. Peabody Coal Co.,* 21 B.L.R.1-201, BRB No. 97-1668 (Oct. 29, 1999) *on recon*. 22 B.L.R. 1-1 (Oct. 29, 1999)(*En banc*). Judge did not err considering a physician's X-ray interpretation "as positive for the existence of pneumoconiosis pursuant to Section 718.202(a)(1) without considering the doctor's comment." The doctor reported the category I pneumoconiosis found on X-ray was not CWP. The Board finds this comment "merely addresses the source of the diagnosed pneumoconiosis (& must be addressed under 20 C.F.R. § 718.203, causation)."

categories are chosen, in box 2B(c) of the X-ray form, then the x-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

CT Scans

The record contains the results of one CT scan read by Dr. Zaldivar. A CAT scan falls into the "other means" category of 20 C.F.R. § 718.304(c) rather than being considered an X-ray under § 718.304(a). A CAT scan is "computed tomography scan or computer aided tomography scan. Computed tomography involves the recording of 'slices' of the body with an x-ray scanner (CT scanner). These records are then integrated by computer to give a cross-sectional image. The technique produces an image of structures at a particular depth within the body, brining them into sharp focus while deliberately blurring structures at other depths. *See,* THE BANTAM MEDICAL DICTIONARY, 96, 437 (Rev. Ed. 1990)." *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31 (1991). In *Consolidation Coal C. v. Director, OWCP [Stein]*, ___ F.3d ___, 22 B.L.R. 2-409, 2002 WL 1363785 (7th Cir. June 25, 2002), the Court rejected the employer's argument that a negative CT is conclusive evidence the miner does not have pneumoconiosis. The DOL has rejected such a view. Nor need a negative CT be given controlling weight because the statutory definition of "pneumoconiosis" encompasses a broader spectrum of diseases than those pathological conditions which can be detected by clinical test such as X-rays and CT scans.

Dr. Zaldivar is a B-reader and Board-certified in pulmonary disease and internal medicine. Dr. Zaldivar reviewed a CT scan dated January 9, 2002. Dr. Zaldivar found the presence of bilateral pleural thickening with nodular fibrosis at the pleura itself. Dr. Zaldivar concluded that the findings are not the result of pneumoconiosis. He opined that the findings are a result of an old inflammatory lesion. (EX 5).

B. Pulmonary Function Studies

Pulmonary Function Studies ("PFS") are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

Physician Date Exh.#	**Age Height**	**FEV_1**	**MVV**	**FVC**	**Trac-ings**	**Compre-hension Coopera-tion**	**Qualify * Conform****	**Dr.'s Impression**
Dr. Zaldivar 10/27/2003 EX 4	68 67"	2.35		3.78	Yes		No Yes	
Dr. Zaldivar 10/27/2003 EX 4 Post-bron	68 67"	2.36		3.69	Yes		No Yes	

Physician Date Exh.#	Age Height	FEV_1	MVV	FVC	Trac-ings	Compre-hension Coopera-tion	Qualify * Conform**	Dr.'s Impression
Dr. Crisalli 6/9/2003 EX 2	68 68"	2.66	68	4.04	Yes	Good Good	No Yes	
Dr. Crisalli 6/9/2003 EX 2 Post-bron	68 68"	2.76		4.03	Yes	Good Good	No Yes	
Dr. Ranavaya 10/23/2001 DX 14	66 67"	2.69		3.86	Yes	Good Good	No Yes	Normal Spirometry
Dr. Ranavaya 10/23/2001 DX 14 Post-bron	66 67"	2.61		3.76	Yes	Good Good	No Yes	Normal spirometry

*A "**qualifying**" pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.

** A study "**conforms**" if it complies with applicable standards (found in 20 C.F.R. § 718.103(b) and (c)). (*See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 (7th Cir. 1993)). A judge may infer in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP,* 6 B.L.R. 1-1083 (1984). A study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984).

Appendix B (Effective Jan. 19, 2001), (2)(ii)(G): Effort is deemed "unacceptable" when the subject "[H]as an excessive variability between the three acceptable curves. The variation between the two largest FEV_1'S of the three acceptable tracings should not exceed 5 percent of the largest FEV_1 or 100 ml, whichever is greater. As individuals with obstructive disease or rapid decline in lung function will be less likely to achieve the degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits. Failure to meet this standard should be clearly noted in the test report by the physician conducting or reviewing the test." (Emphasis added).

For a miner of the claimant's height of 67.3 inches, § 718.204(b)(2)(i) requires an FEV_1 equal to or less than 1.71 for a male 68 years of age.[10] If such an FEV_1 is shown, there must be in addition, an FVC equal to or less than 2.21 or an MVV equal to or less than 68; or a ratio equal to or less than 55% when the results of the FEV_1 tests are divided by the results of the FVC test. Qualifying values for other ages and heights are as depicted in the table below. The FEV_1/FVC ratio requirement remains constant.

Height	Age	FEV_1	FVC	MVV
67	68	1.71	2.21	68

[10] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This is particularly true when the discrepancies may affect whether or not the tests are "qualifying." *Toler v. Eastern Associated Coal Co.*, 42 F.3d 3 (4th cir. 1995). I find the miner is 67.3" here, his average reported height.

68	68	1.77	2.29	71
67	66	1.63	2.25	70

C. Arterial Blood Gas Studies[11]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O2) compared to carbon dioxide (CO2) in the blood, expressed in percentages, indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

Date **Ex. #**	**Physician**	**PCO2**	**PO2**	**Qualify**	**Physician Impression**
10/27/2003 EX 4	Dr. Zaldivar	35 34*	77 81*	No No	Exercise stopped due to shortness of breath.
6/9/2003 EX 2	Dr. Crisalli	36	77	No	
10/23/2001 DX 13	Dr. Ranavaya	39 31.6*	62 83*	No No	

*Results, if any, after exercise. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b).

Appendix C to Part 718 (Effective Jan. 19, 2001) states: "Tests shall not be performed during or soon after an acute respirator or cardiac illness."

D. Physicians' Reports

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(A)(4). Where total disability cannot be established, under 20 C.F.R. § 718.204(b)(2)(i) through (iii), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

Dr. Castle is a B-reader and is Board-certified in internal medicine and pulmonary disease. His consultation report, dated December 12, 2003, based upon his review of the medical

[11] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.
20 C.F.R. §718.204(b)(2) permits the use of such studies to establish "total disability." It provides: In the absence of contrary probative evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability:…
(2)(ii) Arterial blood gas tests show the values listed in Appendix C to this part…

records of the claimant, notes 20 years of coal mine employment. Dr. Castle noted that the Claimant provided doctors with a variable history of tobacco abuse. (EX 9).

Based on Claimant's medical history, physical examinations, radiographic evidence, physiologic testing and arterial blood gases, Dr. Castle stated that Mr. Watkins "may have radiographic evidence of simple coal workers' pneumoconiosis." Dr. Castle stated that Mr. Watkins was exposed to coal dust for a sufficient enough time to develop coal workers' pneumoconiosis in a susceptible host. Dr. Castle also noted that Claimant's cigarette smoking history is sufficient to have caused him to develop chronic obstructive pulmonary disease, if he were a susceptible host. Additionally, Dr. Castle stated that Claimant's history of cardiac disease is a risk factor for the development of pulmonary symptoms. Dr. Castle explained that Claimant was noted to be significantly obese on numerous occasions, which is a risk factor for the development of pulmonary symptoms. (EX 9). Thereafter, Dr. Castle stated "it is my opinion with a reasonable degree of certainty that Mr. Franklin Watkins does not have coal workers' pneumoconiosis." (EX 9).

Dr. Castle further concluded that Mr. Watkins "is not permanently and totally disabled as a result of coal workers' pneumoconiosis or as a result of any other process which has arisen from his coal mining employment duties." Dr. Castle opined that the Claimant does not have a respiratory impairment. He found that the Claimant is "very likely" permanently and totally disabled as a result of coronary artery disease, hypertension, obesity and his age. (EX 9).

On December 16, 2003, Dr. Castle was deposed by Employer's counsel.[12] (EX 13). Dr. Castle stated that Claimant's coal mine job would have included some heavy labor. (EX 13, p.10). Dr. Castle characterized Claimant's variable smoking history as a "very significant smoking history." (EX 13, p.11).

In discussing Claimant's pulmonary problems, Dr. Castle stated that the claimant has not demonstrated any significant degree of "obstructive or restriction or diffusion abnormality." Dr. Castle found no disabling respiratory impairment from any cause. Dr. Castle noted a "very minimal airway obstruction" due to an extensive tobacco smoking history. (EX 13, p.12).

Dr. Castle reviewed a January 9, 2002 CT scan of the Claimant. He found bilateral pleural thickening and scarring with associated linear fibrotic changes around the pleural scars. Dr. Castle opined that such changes were due to a chronic inflammatory process rather than pneumoconiosis. (EX 13, p.15).

As noted above, Dr. Castle's December 12, 2003 report stated the Claimant "may have" radiographic evidence of pneumoconiosis. At his deposition, Employer's counsel questioned a possible diagnosis of pneumoconiosis:

[12] Employer's counsel included four X-ray readings by Dr. Castle, dated September 29, 2003, as deposition exhibits. These four X-rays readings were not admitted into evidence at the July 1, 2004 hearing and such readings are not considered in this claim. Additionally, the deposition testimony of Dr. Castle discussing his four X-ray readings is not considered in evaluating whether claimant has pneumoconiosis. As such, Employer's exhibit 13, page 14, line 1 through page 15, line 7 is not considered.

> Q: Okay. And now, on your report, Doctor, on page 12, it would appear that you had made a diagnosis of coal workers' pneumoconiosis in this case?
>
> A. That is a typographical error, and I apologize for that. I caught it myself, and it should say, instead of saying "may have," it should say "does not have."

(EX 13, p.17). Dr. Castle testified that Claimant does not have legal or clinical pneumoconiosis. (EX 13, p.18).

Dr. Zaldivar is a B-reader and is Board-certified in pulmonary diseases, internal medicine, sleep disorder and critical care medicine. His report, dated November 17, 2003, based upon his examination of the claimant, on October 27, 2003, notes 20 years of coal mine employment. Dr. Zaldivar also reviewed medical records of the Claimant. He noted that the Claimant began smoking a half-pack of cigarettes per day at age 22 (1957) and quit in 1963. (EX 4). Dr. Zaldivar described the claimant's symptoms as shortness of breath, cough productive of black sputum, and wheezing at nighttime. Dr. Zaldivar noted that the Claimant stated that he had a small heart attack in 1991. (EX 4).

Based on arterial blood gases, a pulmonary function study, and a chest X-ray, Dr. Zaldivar concluded that there is no evidence to justify a diagnosis of coal workers' pneumoconiosis or any dust disease of the lungs. Dr. Zaldivar found a radiographic abnormality unrelated to pneumoconiosis. He found pleural abnormalities that are present within the pleura itself. Dr. Zaldivar opined that Claimant has no pulmonary impairment. Dr. Zaldivar explained that the very mild abnormal diffusion is of no physiological significance given the normal cardiopulmonary stress test with exercise and resting blood gases. (EX 4).

On December 30, 2003, Dr. Zaldivar was deposed by Employer's counsel. (EX 14). Dr. Zaldivar examined the Claimant on April 8, 1992 and October 27, 2003. The April 8, 1992 examination report is not included in evidence in the Claimant's current claim for benefits. Dr. Zaldivar diagnosed Claimant with coal workers' pneumoconiosis at the 1992 examination. After the 2003 examination, Dr. Zaldivar concluded that Claimant does not have pneumoconiosis.

Dr. Zaldivar explained that pulmonary impairment may or may not be present with coal workers' pneumoconiosis. He stated that Mr. Watkins has "some mild reversible obstruction with a mild diffusion impairment." Dr. Zaldivar based this finding on a pulmonary function study and an arterial blood gas study. (EX 14, p.6). Dr. Zaldivar explained that it is possible to have a diffusion abnormality with no real pulmonary impairment. (EX 14, p.17).

Dr. Zaldivar explained that Claimant's shortness of breath is a matter of general physical deconditioning. He concluded that, based on a totality of the evidence, Claimant has no pulmonary impairment. (EX 14, p.10). Dr. Zaldivar noted that the ventilatory studies performed by Drs. Ranavaya and Crisalli produced similar results to his study.

Dr. Zaldivar defined disease as "the malfunctioning of an organ system." He concluded that Mr. Watkins does not have a pulmonary disease. (EX 14, p.15). Dr. Zaldivar found some abnormalities, but no impairment. (EX 14, p.18).

Dr. Zaldivar found radiographic pleural abnormalities. Dr. Zaldivar reviewed a January 9, 2002 CT scan of the Claimant. He opined that the CT scan shows that there is no coal workers' pneumoconiosis. (EX 14, p.24). Dr. Zaldivar explained:

> There is a tremendous amount of pleural scarring in the upper zones which is seen radiographcially, by the way, as stranding linear densities originating within the upper zones of the lungs which typically look like pleura. But the CAT scan tells me that in fact, this is pleura. It's very thick. It's partially calcified.
>
> There are round nodules located right next to this pleural abnormality which to me means that there was some condition, some disease, such as a pneumonia, for example, that has affected primarily the pleura and, secondarily, the lung adjacent to the pleura.
>
> And coal workers' pneumoconiosis does not do that. Coal workers' pneumoconiosis never affects the pleura in any way.

(EX 14, pp.24-25).

Dr. Zaldivar discussed Dr. Ranavaya's October 23, 2001 X-ray interpretation. Dr. Ranavaya interpreted the X-ray as 1/2, q/r. Dr. Zaldivar does not dispute Dr. Ranavaya's q and r findings. Dr. Zaldivar testified that the CAT scan he reviewed shows that what appears to be q and r are really densities that are peripherally located next to the very thick calcified pleura, and is not due to pneumoconiosis. (EX 14, pp.30-31). Dr. Zaldivar stated that Claimant's abnormality "looks like" sarcoidosis. Coal dust exposure does not cause or contribute to sarcoidosis. (EX 14, p. 36).

Dr. Ranavaya is a B-reader and is Board-certified in occupational medicine. His report, based upon his examination of the claimant, on October 23, 2001, notes twenty years of coal mine employment and a 40-year smoking history at one pack per week. (DX 12). Dr. Ranavaya described the claimant's symptoms as daily sputum, wheezing, daily dyspnea, occasional chest pain, daily ankle edema, and paroxysmal nocturnal dyspnea. Dr. Ranavaya noted that Mr. Watkins complains of shortness of breath upon mild to moderate exertion. He becomes short of breath when walking about 50 feet on level ground, about 10-15 feet up a gentle incline and up about 10-15 steps. He noted that Claimant's medical history includes pneumonia, pleurisy, attacks of wheezing, arthritis, a heart attack in 1991, and high blood pressure. (DX 12).

Based on arterial blood gases, a pulmonary function study, and a positive chest X-ray, Dr. Ranavaya diagnosed pneumoconiosis, coronary artery disease and hypertension. He opined that Claimant's pneumoconiosis is caused by his occupational exposure to coal dust. (DX 12).

He opined that the claimant has a minimal pulmonary impairment which in and of itself would not prevent Mr. Watkins from performing his usual or last coal mine employment. (DX 12).

III. Witness' Testimony

The Claimant testified at the July 1, 2004 hearing. (TR 13). Claimant was 69 years old on the date of the hearing. Claimant testified that he was exposed to coal dust "all the time" and wore a respirator "once in a while." Claimant explained that he has difficulty walking up a flight of stairs due to shortness of breath. Claimant stated that, due to his breathing difficulties, he can no longer walk in the mountains or hunt. Mr. Watkins testified that he has difficulty sleeping and has to get up to catch his breath. Claimant stated that he could not perform his previous coal mine job because he can no longer do the walking or dragging necessary to perform the job. Mr. Watkins explained that in addition to breathing difficulties, he has arthritis, high blood pressure, and takes medication for his cholesterol. Claimant testified that he previously had social security disability for heart problems. (TR 16-20). Mr. Watkins testified that he does not take any medication for heart problems. (TR 31).

Mr. Watkins testified that he smoked for about a half a year in 1951. Claimant began smoking again in 1958. He quit smoking when his daughter was born in 1963. Thereafter, Claimant began smoking again in 1986 and continued smoking until 1990 when he was admitted to the hospital for a heart attack. Claimant testified that he smoked between a half a pack to a pack and a half of cigarettes per day between 1986 and 1990. (TR 21-22). Employer's counsel question Claimant on whether he was still smoking in 1992. Employer's counsel noted that at a 1992 hearing, Claimant stated that he was smoking a pack of cigarettes a day at that time. Claimant responded that he did not recall the questioning at the 1992 hearing regarding his smoking history. (TR 29).

The Claimant's daughter, Lucy Kara Shamblin, also testified at the hearing. The witness explained that the Claimant has difficulty doing anything physical. She stated that Claimant has to stop and catch his breath after climbing 12 steps. Ms. Shamblin testified that Claimant began getting short of breath in the 1980's. (TR 24-25).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of the evidence, that: (1) he has pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; and, (3) he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202-718.205; *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and, *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997). The claimant bears the burden of proving each element of the claim by a preponderance of the evidence, except insofar as a presumption may apply. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1320 (3rd Cr. 1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP,* 9 B.L.R. 1-1 (1986). Moreover, "[T]he presence of evidence favorable to the claimant or even a tie in the proof will not suffice to

meet that burden." *Eastover Mining Co. v. Director, OWCP [Williams]*, ___ F.3d ___, No. 01-4064 (6th Cir. July 31, 2003), *citing Greenwhich Collieries [Ondecko]*, 512 U.S. 267 at 281.

Since this is the claimant's second claim for benefits, and it was filed on or after January 19, 2001, it must be adjudicated under the new regulations.[13] Although the new regulations dispense with the "material change in conditions" language of the older regulations, the criteria remain similar to the "one-element" standard set forth by the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), which was adopted by the United States Court of Appeals for the Fourth Circuit, in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997). In *Dempsey v. Sewell Coal Co. & Director, OWCP*, ___ B.L.R. ___, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004), the Board held that where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement…has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. Section 725.309(d); *White v. New White Coal Co., Inc.*, 23 B.L.R. 1-1, 1-3 (2004). According to the Board, the "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. Section 725.309(d)(2).

To assess whether a material change in conditions is established, the Administrative Law Judge ("Administrative Law Judge") must consider all of the new evidence, favorable and unfavorable, and determine whether the claimant has proven, at least one of the elements of

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[13] Section 725.309(d)(For duplicate claims filed on or after Jan. 19, 2001)(65 Fed. Reg. 80057 & 80067):

(d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subpart E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see Sections 725.202(d)(miner), 725.212(spouse), 725.218(child), and 725.222(parent, brother or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

(5) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

entitlement previously adjudicated against him in the prior denial of July 30, 1992, i.e., disability due to the disease. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997). *See Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 792 (4th Cir. 1990). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Unlike the Sixth Circuit in *Sharondale,* the Fourth Circuit does not require consideration of the evidence in the prior claim to determine whether it "differ[s] qualitatively" from the new evidence. *Lisa Lee Mines*, 86 F.3d at 1363 n. 11. The Administrative Law Judge must then consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits.

In *Caudill v. Arch of Kentucky, Inc.*, 22 B.R.B. 1-97, BRB No. 98-1502 (Sept. 29, 2000)(*en banc on recon.*), the Benefits Review Board held the "material change" standard of section 725.309 "requires an adverse finding on an element of entitlement because it is necessary to establish a baseline from which to gauge whether a material change in conditions has occurred." Unless an element has previously been adjudicated against a claimant, "new evidence cannot establish that a miner's condition has changed with respect to that element." Thus, in a claim where the previous denial only adjudicated the matter of the existence of the disease, the issue of total disability "may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions…"

The claimant's first application for benefits was denied because the evidence failed to show that the claimant was totally disabled by pneumoconiosis. (DX 3). Under the *Sharondale* standard, the claimant must show the existence of one of these elements by way of newly submitted medical evidence in order to show that a material change in condition has occurred. If he can show that a material change has occurred, then the entire record must be considered in determining whether he is entitled to benefits.

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[14] 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilisosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201.[15]

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[14] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1362; *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995) at 314-315. In *Henley v. Cowan and Co*., 21 B.L.R. 1-148 (May 11, 1999), the Board holds that aggravation of a pulmonary condition by dust exposure in coal mine employment must be "significant and permanent" in order to qualify as CWP, under the Act.

[15] Regulatory amendments, effective January 19, 2001, state:

(a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.

(1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Thus, "pneumoconiosis", as defined by the Act, has a much broader legal meaning than does the medical definition.

"…[T]his broad definition 'effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines.'" *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-78, 914 F.2d 35 (4th Cir. 1990) *citing, Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938 (4th Cir. 1980).

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995) and *see* § 718.201(a)(2).

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest X-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a)(1); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion.[16] 20 C.F.R. § 718.202(a)(4).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers'

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amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.
(Emphasis added).

[16] In accordance with the Board's guidance, I find each medical opinion documented and reasoned, unless otherwise noted. *Collins v. J & L Steel,* 21 B.L.R. 1-182 (1999) *citing Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); and, *Sterling Smokeless Coal Co. v. Akers*, 121 F.3d 438, 21 B.L.R. 2-269 (4th Cir. 1997). This is the case, because except as otherwise noted, they are "documented" (medical), i.e., the reports set forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis and "reasoned" since the documentation supports the doctor's assessment of the miner's health.

pneumoconiosis. This is contrary to the Board's view that an administrative law judge may weigh the evidence under each subsection separately, i.e. X-ray evidence at § 718.202(a)(1) is weighed apart from the medical opinion evidence at § 718.202(a)(4). In so holding, the court cited to the Third Circuit's decision in *Penn Allegheny Coal co. v. Williams,* 114 F.3d 22, 24-25 (3d Cir. 1997) which requires the same analysis.

The claimant cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable to a living miner's claim field after January 1, 1982, with no evidence of complicated pneumoconiosis.

A finding of the existence of pneumoconiosis may be made with positive chest X-ray evidence. 20 C.F.R. § 718.202(a)(1). The correlation between "physiologic and radiographic abnormalities is poor" in cases involving CWP. "[W]here two or more X-ray reports are in conflict, in evaluating such X-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." *Id.; Dixon v. North Camp Coal Co*., 8 B.L.R. 1-344 (1985)." (Emphasis added). (Fact one is Board-certified in internal medicine or highly published is not so equated). *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31 (1991) at 1-37. Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n.5 (1985).

A judge is not required to defer to the numerical superiority of X-ray evidence, although it is within his or her discretion to do so. *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990) citing *Edmiston v. F & R Coal*, 14 B.L.R. 1-65 (1990).This is particularly so where the majority of negative readings are by the most qualified physicians. *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344(1985); *Melnick v. Consolidation Coal Co. & Director, OWCP,* 16 B.L.R. 1-31, 1-37 (1991).

Claimant's most recent X-ray is dated October 27, 2003. Dr. Wheeler, a dually qualified physician, and Dr. Zaldivar, a B-reader, interpreted this X-ray as negative for coal workers' pneumoconiosis. There are no positive readings of this X-ray. Therefore, I find the October 27, 2003 X-ray is negative for coal workers' pneumoconiosis.

An October 23, 2001 X-ray of the Claimant has conflicting interpretations. Dr. Scott, a dually qualified physician, interpreted the X-ray as negative for coal workers' pneumoconiosis. Dr. Ranavaya, a B-reader, interpreted the X-ray as positive with a profusion of 1/2. Dr. Binns provided a quality-only reading of this X-ray. Based on the qualifications of the reading physicians, I find the October 23, 2001 X-ray as negative for coal workers' pneumoconiosis.

The evidence also includes a reading by Dr. Zaldivar of an October 31, 1988 X-ray. Dr. Zaldivar does not list an ILO classification or any comments on the X-ray reading form. As such, it cannot support a finding of pneumoconiosis. Therefore, I find the October 31, 1988 X-ray negative for coal workers' pneumoconiosis.

In summary, I find the October 31, 1988, October 23, 2001 and October 27, 2003 X-rays negative for coal workers' pneumoconiosis. Claimant has not established pneumoconiosis by X-ray evidence. In addition to the X-ray evidence, the record contains an interpretation by Dr. Zaldivar of a January 9, 2002 CT scan. Dr. Zaldivar concluded that the CT scan does not show evidence of coal workers' pneumoconiosis. As such, I find the CT scan evidence of record negative for coal workers' pneumoconiosis.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative X-ray. 20 C.F.R. § 718.202(a).

Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical pinions as contemplated by the Regulations. *Justice v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). However, where the physician's report, although documented, fails to explain how the documentation supports its conclusions, an Administrative Law Judge may find the report is not a reasoned medical opinion. *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984). A medical opinion shall not be considered sufficiently reasoned if the underlying objective medical data contradicts it.[17] *White v. Director, OWCP*, 6 B.L.R. 1-368 (1983).

Physician's qualifications are relevant in assessing the respective probative value to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). The record contains opinions by Drs. Castle, Ranavaya, and Zaldivar. All three physicians are B-readers and have various Board-certifications. As such, I find the physicians are highly qualified. However, I rank Drs. Castle and Zaldivar over Dr. Ranavaya. Drs. Castle and Zaldivar are Board-certified in pulmonary disease. Dr. Ranavaya is Board-certified in occupational medicine.

Dr. Castle concluded that Claimant does not have coal workers' pneumoconiosis. Dr. Castle attributed any respiratory impairment to Claimant's cigarette smoking history. Initially, Dr. Castle's opinion appears contradictory. In the middle of his opinion, he stated Claimant "may have" pneumoconiosis. At the end, he declared that Claimant "does not have" pneumoconiosis. Dr. Castle, however, clarified these statements at his deposition. He testified that "may have" was a typographical error. Based on the deposition testimony clarifying his conclusion, I find that Dr. Castle provided a detailed and reasoned opinion regarding coal workers' pneumoconiosis.

Dr. Ranavaya examined the Claimant in 2001 and diagnosed him with coal workers' pneumoconiosis. Dr. Ranavaya noted Claimant's cigarette smoking history as 40 years, but did not discuss the effect, if any, of Claimant's smoking habit on his respiratory impairment. Dr. Ranavaya only lists coal dust exposure as the cause of Claimant's pneumoconiosis. As such, I interpret that to mean that Dr. Ranavaya concluded that Claimant's smoking history did not

[17] *Fields v. Director, OWCP*, 10 B.L.R. 1-19, 1-22 (1987). "A 'documented' (medical) report sets forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis. A report is 'reasoned' if the documentation supports the doctor's assessment of the miner's health. *Fuller v. Gibraltor Coal Corp.*, 6 B.L.R. 1-1291 (1984)…"

cause any of his impairment. I find that Dr. Ranavaya provided a reasoned opinion based on his examination of the Claimant. However, I find that Drs. Castle and Zaldivar provided a more detailed opinion than Dr. Ranavaya and accord their opinions more weight than Dr. Ranavaya's opinion.

Dr. Zaldivar examined the Claimant in 2003. Dr. Zaldivar concluded that Claimant does not have coal workers' pneumoconiosis. He noted pleural abnormalities unrelated to coal workers' pneumoconiosis. Dr. Zaldivar based his opinion on X-rays, a CT scan, Claimant's medical records and his examination of the Claimant. Although Dr. Zaldivar noted a shorter smoking history than the other physician opinions of record and my finding of a ten-year smoking history, I find that it is inconsequential to his conclusion due to the fact that Dr. Zaldivar found no pulmonary impairment. I find that Dr. Zaldivar provided a reasoned and detailed opinion regarding the type of abnormalities seen on Claimant's radiographic evidence. He also provided a reasoned opinion on why the totality of the evidence does not support a finding of coal workers' pneumoconiosis.

In summary, I find that Drs. Castle, Ranavaya and Zaldivar are highly qualified physicians and provided reasoned opinions. I find, however, that the opinions of Drs. Castle and Zaldivar are entitled to more weight than Dr. Ranavaya, due to the detailed explanations by Drs. Castle and Zaldivar. As such, the physician opinions do not support a finding of coal workers' pneumoconiosis.

After weighing the X-ray evidence, CT scan evidence and physician opinions together, I find the claimant has not met his burden of proof in establishing the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) *aff'g sub. nom. Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 B.L.R. 2-64 (3d Cir. 1993).

C. Cause of Pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R § 718.203(b). If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c).

Since the miner had ten years or more of coal mine employment, the claimant would ordinarily receive the benefit of the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. However, in view of my finding that the existence of CWP has not been proven the issue is moot. Moreover, the presumption is rebutted by the medical opinion evidence discussed herein.

D. Existence of total disability due to pneumoconiosis

The claimant must show his total pulmonary disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(b).[18] Section 718.204(b)(2)(i) through (b)(2)(iv) set forth criteria to establish total disability: (i) pulmonary function studies with qualifying values; (ii) blood gas studies with qualifying values; (iii) evidence that miner has pneumoconiosis and suffers from cor pulmonale with right-side congestive heart failure; (iv) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment; and lay testimony. Under this subsection, the Administrative Law Judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If it does, the Administrative Law Judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *see also Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986), *aff'd on reconsideration en banc*, 9 B.L.R. 1-236 (1987).

Section 718.204(b)(2)(iii) is not applicable because there is no evidence that the claimant suffers from cor pulmonale with right-sided congestive heart failure. § 718.204(d) is not applicable because it only applies to a survivor's claim or deceased miners' claim in the absence of medical or other relevant evidence.

Section 718.204(b)(2)(i) provides that a pulmonary function test may establish total disability if its values are equal to or less than those listed in Appendix B of Part 718.

Three doctors performed pre-bronchodilator and post-bronchodilator pulmonary function studies. None of these studies produced qualifying results. Thus, the Claimant did not prove total disability based on the results of pulmonary function studies.

Claimants may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(b)(2)(ii).

The three doctors that performed pulmonary function studies also performed arterial blood gas studies. None of these studies produced qualifying results. Thus, the Claimant did not prove total disability based on the results of arterial blood gas studies.

Finally, total disability may be demonstrated, under § 718.204(b)(2)(iv), if a physician, exercising reasoned medial judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition presents or

[18] § 718.204 (Effective Jan. 19, 2001). Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis, states: (a) General. Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease shall be considered in determining whether a miner is or was totally disabled due to pneumoconiosis.

prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable or gainful work. § 718.204(b). Under this subsection, "…all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing, by a preponderance of the evidence, the existence of this element." *Mazgaj v. Valley Coal Company*, 9 B.L.R. 1-201 (1986) at 1-204. The fact finder must compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Schetroma v. Director, OWCP,* 18 B.L.R. 1-19 (1993). Once it is demonstrated that the miner is unable to perform his usual coal mine work a *prima facie* finding of total disability is made and the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party opposing entitlement, as defined pursuant to 20 C.F.R. § 718.204(b)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

As noted above, Drs. Castle, Ranavaya and Zaldivar submitted medical opinions regarding the Claimant's respiratory impairment. The doctors agree that Mr. Watkins does not have a totally disabling respiratory impairment. As such, the Claimant did not prove total disability by physician opinion.

I find that the miner's last coal mining positions required heavy manual labor. Because the claimant's symptoms do not render him unable to walk short distances and lift heavy objects, I find he is capable of performing his prior coal mine employment.

I find the claimant has not met his burden of proof in establishing the existence of total disability. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994), *aff'g sub. Nom. Greenwich Colleries v. Director, OWCP*, 990 F.2d 730, 17 B.L.R. 2-64 (3d Cir. 1993).

E. Cause of total disability

Since I have found that the evidence of record fails to establish that Mr. Watkins suffers from a total respiratory disability, I accordingly find that Mr. Watkins failed to establish that he suffers from a total respiratory disability due to pneumoconiosis.

ATTORNEY FEES

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

CONCLUSIONS

In conclusion, the claimant has not established that a material change in condition has taken place since the previous denial. The claimant does not have pneumoconiosis, as defined by the Act and Regulations. The claimant is not totally disabled. As such, he is not totally disabled due to pneumoconiosis. He is therefore not entitled to benefits.

ORDER[19]

It is ordered that the claim of FRANKLIN DELANO WATKINS for benefits under the Black Lung Benefits Act is hereby DENIED.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS (**Effective Jan. 19, 2001**): Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board before the decision becomes final, i.e., at the expiration of thirty (30) days after "filing" (or **receipt by**) with the Division of Coal Mine Workers' Compensation, OWCP, ESA, ("DCMWC"), by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of**

[19] § 725.478 Filing and service of decision and order (Change effective Jan. 19, 2001). Upon receipt of a decision and order by the DCMWC, the decision and order shall be considered to be filed in the office of the district director, and shall become effective on that date.

[20] 20 C.F.R. § 725.479 (Change effective Jan. 19, 2001). (d) Regardless of any defect in service, **actual receipt** of the decision is sufficient to commence the 30-day period for requesting reconsideration or appealing the decision.